

## ***5 Official Opinions of the Compliance Board 194***

### **PUBLIC BODY – “MANAGEMENT COMMITTEE” ESTABLISHED BY MEMORANDUM OF AGREEMENT, HELD NOT TO BE A PUBLIC BODY**

October 25, 2007

*Craig O'Donnell*  
*Kent County News*

The Open Meetings Compliance Board has considered your complaint that the “Management Committee,” a three-member entity comprising representatives of the Town of Chestertown, Kent County, and the Eastern Shore Land Conservancy (“ESLC”), violated the Open Meetings Act in connection with a meeting held on July 31, 2007. Specifically, the complaint asserted that the Management Committee was subject to the Open Meetings Act and conducted the meeting in violation of the Act’s substantive and procedural requirements. Given that the County and the Town were the governmental jurisdictions represented on the Management Committee, they were asked to respond on behalf of the Committee.

For the reasons explained below, we find that the Management Committee is not a public body under the Open Meetings Act. Because the Act is not applicable to the Management Committee, its meeting on July 31, 2007, did not result in any violation. This opinion does not address the status of the larger advisory committee that includes the members of the Management Committee.

## **I**

### **Complaint and Response**

The complaint noted that on July 31, 2007, a closed meeting was held among a member of the Board of County Commissioners, the Mayor of Chestertown, and a staff member of the ESLC. The three individuals constitute the “Management Committee,” established pursuant to a memorandum of agreement among the three parties, as part of a process that is expected to lead to a master plan for the development of certain property outside the Town on which the ESLC currently holds options to purchase.<sup>1</sup> The complaint indicated that the County has zoning

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<sup>1</sup> While the complaint referred to the “Management Team,” throughout this opinion, we will refer to the “Management Committee,” the term used in the memorandum of agreement.

authority over the property and that on completion of the plan, proposals will be solicited from developers for implementation of the plan.

According to the complaint, at the start of the meeting, a reporter was told that the meeting was not public “because the [Management Committee] is not a public body.” The complaint noted the Management Committee is part of a larger advisory panel, including citizens representatives, that will be involved in the planning process. During the course of the Management Committee’s closed meeting, the complaint went on, a consultant was selected and 12 additional members of the advisory panel were named. The complaint further noted the many governmental decisions that might flow from the process.

As to the Management Committee’s status as a public body, the complaint pointed out that it was created as a result of a memorandum of agreement – a type of contract, and therefore the Committee was created by means of a quasi-legislative function under the Open Meetings Act. The complaint equated the memorandum of agreement to a resolution. According to the complaint, the Management Committee is therefore a public body as that term is defined for purposes of the Act. Furthermore, the acceptance of the County and Town of two members who were not employees of the respective local governments, coupled with the appointment of 12 additional members, triggered the alternative definition of a public body under the Act.

The complaint itemized five alleged violations by the Management Committee on July 31. The meeting was called without adequate public notice; minutes were not produced; the meeting was closed without following the Act’s procedural requirements; bids were discussed in a closed session; and there was a violation of “the law’s admonition to construe [the Act] in favor of open sessions.”<sup>2</sup>

In a joint response timely submitted on behalf of the County and Town, Thomas Yeager, Kent County Attorney, and R. Stewart Barroll, Chestertown Town Attorney, denied that the Open Meetings Act was violated. In their view, the Management Committee is not a public body under the Open Meetings Act. The response reviewed the history of the Chestertown Greenbelt Master Plan Project, an initiative of the ESLC. On May 29, 2007, the County signed the memorandum of agreement, which, among other things, provided for the participation of a County representative on the Management Committee. On June 4, the Town announced its decision to participate as well. County Commissioner William Pickrum was

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<sup>2</sup> A subsequent e-mail message from the complainant, dated October 5, 2007, contained additional detail about the July 31 meeting and other activities of the Management Committee. However, because this supplement to the complaint did not affect our analysis of the question whether the Management Committee is a public body, we did not invite the County and Town to supplement their response.

designated as the County's representative, while Mayor Margo Bailey was designated as representative of the Town. The Management Committee has no legal authority in its own right. The ESLC, not the Committee, contracted with the consultant to assist in the planning effort.

While the July 31 meeting was noted on the ESLC's website and the County Commissioner's weekly agenda, and an advance agenda was submitted to the County and Town by ESLC staff, the meeting was not conducted in accordance with the Open Meetings Act because the participating parties believed that the Management Committee is not a public body as defined in §10-502(h).<sup>3</sup> The response also noted that, while it is the intention of the parties that project meetings be conducted publicly, the initial meeting was not open because it involved selection of the advisory committee and a consultant to be hired by the ESLC. However, according to the response, minutes of the meeting were promptly posted on the ESLC's website, and both the County's and Town's websites provide links to the project information available through the ESLC. The response also noted that the larger advisory committee is not provided for in the memorandum of agreement but was recommended after the agreement had been signed.

## II

### Analysis

Deciding whether the Open Meetings Act applies to a gathering involves a three-part analysis: (1) Is the entity in question a "public body" subject to the Act? (2) If so, did the particular gathering at issue constitute a "meeting" for purposes of the Act? (3) Finally, was the topic of discussion subject to the Act? *See, e.g., 1 OMCB Opinions* 113, 114 (1995). If the answer to any of these questions is "no," the inquiry ends, because none of the Act's substantive or procedural requirements come into play. Thus, our focus is on the status of the Management Committee, an entity created pursuant to a memorandum of agreement among the County, Town, and ESLC. For the reasons explained below, we agree with the County and Town's assessment that the Management Committee is not a public body under the Act.

The Open Meetings Act defines a "public body," in relevant part, as:

- (1) ... an entity that:
  - (i) consists of at least 2 individuals; and
  - (ii) is created by:

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<sup>3</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

1. the Maryland Constitution;
2. a State statute;
3. a county charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State.

(2) “Public body” includes:

- (i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or the political subdivision; ...

§10-502(h)(1) and (2)(i). The definition thus sets forth two separate pathways by which an entity might qualify as a “public body.” *City of Baltimore Dev. Corp. v Carmel Reality Assoc.*, 395 Md. 299, 323, 910 A.2d 406 (2006). That is, an entity is a “public body” if it meets the criteria under either paragraph (1) or (2) of this subsection. Conversely, if it meets the criteria under neither paragraph, it is not a public body and, hence, not subject to the Act.

The Management Committee is not a public body under §10-502(h)(1) in that it was established as part of a memorandum of agreement rather than by any of the legal instruments identified in that paragraph. The complaint equated the memorandum of agreement with a resolution adopted by the County or Town. However, in our view, that analogy is misplaced. Unlike a resolution or other legal instrument listed in §10-502(h)(1), a memorandum of agreement is not unilaterally adopted by a county or municipal governing body; instead, it emerges from negotiation among the parties. While a memorandum of agreement, like other contracts, might well bind each party, it is not the equivalent of a legislative action formalized through adoption of an ordinance or resolution or even a bylaw unilaterally adopted by an entity. *Cf. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 42-43 (1983) (differentiating the legal status of a collective bargaining contract from a governmental body’s unilaterally adopted ordinance or rule).

The complaint finds support for its view in the fact that the County and Town's decision to sign the memorandum of agreement involved a quasi-legislative function under the Act. §10-502(j)(3). We disagree. While the process surrounding consideration of the memorandum of agreement was a quasi-legislative function, the only significance of this fact is that the Act applied to the County and Town governing bodies when they considered the agreement. It does not follow that the Management Committee resulting from the agreement is, for that reason, a public body. To be sure, had the Management Committee been established by a joint resolution of the County and Town governing bodies, the Management Committee would have been a public body under §10-502(h)(1). However, an entity established by a memorandum of agreement is not a public body under §10-502(h)(1).

We turn, then, to the possibility that the Management Committee meets the "public body" criteria in the second paragraph of the definition, §10-502(h)(2). The complaint noted that the Management Committee consists of two members not employed by the County and not employed by the Town. This fact, the complaint argued, results in creation of a public body under §10-502(h)(2).

Section 10-502(h)(2) was added to the Open Meetings Act by Chapter 655, Laws of Maryland 1991. Its purpose, we believe, was to make advisory committees informally established by a government chief executive subject to the Act, *provided* that the body included two or more public members.<sup>4</sup> While the Management Committee consists of a representative of the County and of the Town, it only has one non-governmental member, the representative of the ESLC. It does not include the public presence envisioned by the Legislature. Furthermore, the wording of the provision indicates that the non-governmental members are, like other members, "appointed by the ... chief executive authority of a political subdivision ...". In this case, the County and the Town each designates only its own member; neither jurisdiction has the authority to appoint the other two members of the Management Committee.

We view the Management Committee as more analogous to the Governmental Consolidation Joint Committee considered in 2 *OMCB Opinions* 5 (1998). The Joint Committee was established by the City of Salisbury and Wicomico County by consensus, and consisted of four elected officials – two named by each public body. Because the Joint Committee consisted solely of government officials, we concluded that it was not a public body for purposes of §10-502(h)(2). 2 *OMCB*

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<sup>4</sup> When initially enacted, §10-502(h)(2) was subject to a sunset provision. However, the sunset was eliminated by Chapter 473, Laws of Maryland 1994. Among subsequent changes, the definition of a "public body" was expanded to include certain entities appointed by an official who is subject to the policy direction of a government's chief executive authority. Chapter 440, laws of Maryland 2004. None of the amendments, however, affect our analysis.

*Opinions* at 9. Although the Management Committee includes a representative of the ESLC, unaffiliated with either governmental entity, the addition of one non-governmental member does not bring the entity within §10-502(h)(2).

The complaint characterized the Management Committee as a subgroup of a larger advisory committee appointed in connection with the planning project. Although the three members of the Management Committee apparently are part of the larger entity, the two entities were established separately. Only the former was established pursuant to the memorandum of agreement. For purposes of the Open Meetings Act, separate meetings of the two entities must be treated as distinct. We limit our review to the status of the Management Committee – the entity holding the July 31 meeting that is the subject of this complaint. We express no opinion about the applicability of the Open Meetings Act to the advisory committee.

### **III**

#### **Conclusion**

Because the Management Committee is not a public body under the Open Meetings Act, neither the substantive nor the procedural requirements of the Act applied to the July 31 meeting. Thus, no violation occurred.

OPEN MEETINGS COMPLIANCE BOARD

*Courtney J. McKeldin*  
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